Datuk Yong Teck Lee & Ors v Public Prosecutor

COURT OF APPEAL (MALAYSIA) — CIVIL APPEAL NO S–01–35 OF 1994
LAMIN PCA, MAHADEV SHANKAR AND AHMAD FAIRUZ JJCA
10 JANUARY 1996

Criminal Procedure *— Trial — Jurisdiction of magistrates' court — Whether magistrates' court had inherent power to stay proceedings without hearing evidence in support — Criminal Procedure Code (FMS Cap 6) s 173*

Criminal Procedure *— Prohibition order — Application for leave for order of prohibition in High Court — Order to restrain magistrate from further hearing charges — Allegation that charges were an abuse of process of court — Whether order could be granted restraining judicial officer from performing his judicial functions while acting within his jurisdiction — Criminal Procedure Code (FMS Cap 6) s 173, Specific Relief Act 1950 s 54*

On 11 October 1990, the second appellant, a candidate for the Gaya constituency in Sabah, went to the Kota Kinabalu community centre to file his nomination papers. He was accompanied by the first, third, fourth and fifth appellants. All the five appellants were then charged in the magistrates' court with the offence of participating in a procession in a public place without a licence from the officer-in-charge of the police district, thereby committing an offence under s 27(5)(a) and punishable under s 27(8) of the Police Act 1967. The appellants pleaded not guilty. On 3 October 1994, the appellants applied by originating motion before the High Court for leave for an order of prohibition to be issued and addressed to the magistrate below to restrain him from hearing the charges against the appellants. It was argued that to allow the magistrate to commence hearing the charges would be an abuse of the process of the court, as there had been no institution of prosecutions against those participating in the processions accompanying candidates to nomination centres on nomination day for over 18 years, and that consequently, the public had a legitimate expectation that participating in such processions would not invite a prosecution ('the application'). However, the application was dismissed. The appellants appealed.

Held, dismissing the appeal:

(1) The appeal in this case was an application for leave to apply for an order of prohibition to be issued against the magistrate to prevent him from proceeding with the trial on the ground of abuse of the court's process. Therefore, the question before the court was whether such order could be issued against a judicial officer while performing his judicial function that was within his jurisdiction (see p 78A).

(2) The magistrate had no inherent power to stay the proceedings and to acquit the appellants on the charges preferred without

hearing the evidence in support. The legislature had made it abundantly clear as appearing in s 173 of the Criminal Procedure Code (FMS Cap 6) ('the Code') that the magistrate must hear the evidence as may be adduced by the prosecution after an accused person has claimed trial to the charge properly preferred against him (see pp 78I, 79A and 80F).

(3) Unlike a subordinate court within the typical English jurisdiction, a magistrate court in Malaysia clearly did not have the inherent power to stay proceedings of a criminal case, for it has to operate strictly within the four corners of the Code (see p 80B).

(4) The charges brought against the five appellants were perfectly within the jurisdiction of the magistrate to deal with, and rightly, no order of prohibition can be issued against the magistrate (see p 80H).

[Bahasa Malaysia summary

Pada 11 Oktober 1990, perayu kedua, seorang calon untuk bahagian pilihanraya Gaya di Sabah, telah pergi ke balai raya Kota Kinabalu untuk memfailkan kertas pencalonannya. Beliau telah diiringi oleh perayu pertama, ketiga, keempat dan kelima. Kelima-lima orang perayu telah kemudiannya dipertuduh di mahkamah majistret dengan kesalahan menyertai perarakan di tempat awam tanpa suatu lesen daripada pegawai penjaga daerah polis, dan dengan itu telah melakukan satu kesalahan di bawah s 27(5)(a) dan boleh dihukum di bawah s 27(8) Akta Polis 1967. Perayu-perayu telah mengaku tidak bersalah. Pada 3 Oktober 1994, perayu-perayu telah memohon melalui usul pemula di hadapan Mahkamah Tinggi untuk kebenaran agar satu perintah larangan dikeluarkan dan dialamatkan kepada majistret di bawah bagi menahannya daripada membicarakan pertuduhan terhadap perayu-perayu. Adalah dihujahkan bahawa membenarkan majistret untuk memulakan pembicaraan pertuduhan-pertuduhan itu merupakan satu penyalahgunaan proses mahkamah, oleh kerana tidak terdapat permulaan pendakwaan terhadap mereka yang menyertai perarakan mengiringi calon-calon ke pusat pencalonan pada hari pencalonan selama lebih daripada 18 tahun, dan dengan demikian, orang awam mempunyai jangkaan sah bahawa penyertaan perarakan begitu tidak akan mengakibatkan pendakwaan ('permohonan itu'). Namun demikian, permohonan itu telah ditolak. Perayu-perayu membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Rayuan dalam kes ini adalah satu permohonan untuk kebenaran untuk memohon supaya satu perintah larangan dikeluarkan terhadap majistret bagi menahan beliau daripada meneruskan perbicaraan atas alasan penyalahgunaan proses mahkamah. Maka, persoalan yang harus dipertimbangkan oleh mahkamah adalah

sama ada perintah demikian boleh dikeluarkan terhadap seorang pegawai kehakiman sementara melaksanakan fungsi kehakiman yang dilingkungi oleh bidang kuasanya (lihat ms 78A).

(2) Majistret tersebut tidak mempunyai kuasa sedia ada untuk menggantung prosiding dan untuk membebaskan perayu-perayu atas pertuduhan yang dibuat tanpa mendengar keterangan menyokong. Badan perundangan telah pun menjelaskan dengan nyata menerusi s 173 Kanun Acara Jenayah (NMB Bab 6) ('Kanun itu') yang menyatakan bahawa majistret harus mendengar keterangan yang boleh dikemukakan oleh pihak pendakwaan selepas seseorang tertuduh menuntut perbicaraan terhadap pertuduhan yang telah dibuat terhadapnya (lihat ms 78I, 79A and 80F).

(3) Berbeza dengan mahkamah rendah dalam bidang kuasa Inggeris biasa, sesebuah mahkamah majistret di Malaysia jelas tidak mempunyai kuasa sedia ada untuk menggantung prosiding sesuatu kes jenayah, oleh kerana ia terpaksa beroperasi semata-mata dalam lingkungan empat penjuru Kanun itu (lihat ms 80B).

(4) Pertuduhan yang dibawa terhadap lima perayu itu adalah betul-betul dalam bidang kuasa majistret untuk dibicarakan, dan adalah wajar bahawa tiada perintah larangan yang boleh dikeluarkan terhadap majistret tersebut (lihat ms 80H).

[*Editorial Note*: The appellants' application for leave to appeal to the Federal Court has been dismissed.]

Notes

For a case on jurisdiction of magistrates' court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3021.

Cases referred to

JP Berthelsen v Director-General of Immigration Malaysia & Ors [1987] 1 MLJ 134

Karpal Singh & Anor v PP [1991] 2 MLJ 544

Sugumar Balakrishnan v The Chief Minister of The State of Sabah [1988] 3 MLJ 170

R v Li Wing Tat & Ors

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 173(f), (g), 376(1)
Federal Constitution art 145(3)
Immigration Regulations 1963 regs 14(3), 19
Internal Security Act 1960
Police Act No 41 1967 ss 27(5)(a), (8)
Police Act 1967 ss 27(2), (5), (8)
Rules of the High Court 1980 O 53 r 1
Specific Relief Act 1950 (Act 137) s 54

A Summary Offences Ordinance (Cap 228) s 4(17), (29) [Hong Kong]
The English Supreme Court Practice 1993 Vol Part 1 O 53 r 1 [UK]

Appeal from: Originating Motion No K25–12–1994 (High Court, Kota Kinabalu)

B *Clement Skinner (Ho Kin Kong & Lawrence Chong* with him) *(Skinner Willie Wong & Chin)* for the appellant.
Azahar bin Mohamed (Senior Federal Counsel) for the respondent.

Lamin PCA (delivering the grounds of judgment of the court): This is an C appeal by the five appellants against the decision of the learned judge below, Suleiman Hashim J, made on 14 November 1994 dismissing their application for leave for an order of prohibition under O 53 r 1 of the Rules of the High Court 1980. The prohibition was to be issued and addressed to the learned magistrate sitting in the Magistrates' Court, Kota Kinabalu to restrain the same from further hearing magistrates' court criminal cases D Nos 348/90, 349/90, 350/90, 351/90 and 352/90.

The undisputed facts in respect of those cases are briefly as follows.

In October 1990, a parliamentary general election was held in the whole of Malaysia. By virtue of the election writ issued by the election commission on 6 October 1990, the election process commenced E throughout the whole country on that day. Nomination day was fixed for 11 October 1990. One of the parliamentary constituencies to be contested in Sabah was called GAYA P144, and the nomination centre for the Gaya constituency where candidates filed their nomination papers was the Kota Kinabalu community centre. On 11 October 1990, the second appellant F went to the Kota Kinabalu community centre to file his nomination papers, and he was accompanied by the first, third, fourth and fifth appellants. All the five appellants were charged in the magistrates' court with the offence of participating in a procession in a public place without a licence from the officer-in-charge of the police district, Kota Kinabalu thereby committing an offence under s 27(5)(a) and punishable under G s 27(8) of the Police Act No 41 of 1967. The first appellant was preferred with an additional charge of disobeying an order to disperse by the officer-in-charge of the said police district. The charges against them are as follows:

H (1) In respect of Kota Kinabalu Magistrates' Court Summons Case No 348/90, *PP v Datuk Yong Teck Lee*, the charges read:

First Charge

> That you on 11 October 1990 between 9.40am to 12.35pm near Bangunan Great Eastern Life, Jalan Gaya, in the district at Kota Kinabalu, in the state of Sabah, whilst participating in a procession in I respect of which no licence has been issued, did disobey an order to disperse by the Officer-in-Charge of the Police District Kota Kinabalu, and that you have thereby committed an offence under s 27(4) and punishable under s 27(8) of the Police Act No 41 of 1967.

Second Charge

That you on the 11 October 1990 about 12.35pm near Bangunan Great Eastern Life, Jalan Gaya, in the district of Kota Kinabalu, in the state of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s 27(5)(a) and punishable under s 27(8) of the Police Act No 41 of 1967.

(2) In respect of Kota Kinabalu Magistrates' Court Summons Case No 349/90, *PP v Yong Chiew Lip @ Philip Yong*, the charge reads:

That you on 11 October 1990 about 12.35pm near Bangunan Great Eastern Life, Jalan Gaya, in the district of Kota Kinabalu, in the state of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which Police District such procession was convened, and that you have thereby committed an offence under s 27(5)(a) and punishable under s 27(8) of the Police Act No 41 of 1967.

(3) In respect of Kota Kinabalu Magistrates' Court Summons Case No 350/90, *PP v Awang Lamin bin Deramin @ Ste*, the charge reads:

That you on 11 October 1990 about 12.35pm near Bangunan Great Eastern Life, Jalan Gaya, in the district of Kota Kinabalu, in the state of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s 27(5)(a) and punishable under s 27(8) of the Police Act No 41 of 1967.

(4) In respect of Kota Kinabalu Magistrates' Court Summons Case No 351/90, *PP v Wong Kui Sing @ Peter Wong*, the charge reads:

That you on 11 October 1990 about 12.35pm near Bangunan Great Eastern Life, Jalan Gaya, in the district of Kota Kinabalu, in the state of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s 27(5)(a) and punishable under s 27(8) of the Police Act No 41 of 1967.

(5) In respect of Kota Kinabalu Magistrates' Court Summons Case No 352/90, *PP v Akmat bin Umal Basah*, the charge reads:

That you on 11 October 1990 about 12.35pm near Bangunan Great Eastern Life, Jalan Gaya, in the district of Kota Kinabalu, in the state of Sabah, did participate in a procession in a public place without a licence from the Officer-in-Charge of the Police District Kota Kinabalu, in which police district such procession was convened, and that you have thereby committed an offence under s 27(5)(a) and punishable under s 27(8) of the Police Act No 41 of 1967.

All the above five cases were to be proceeded as a joint trial. In brief, the chronology of events that followed leading up to the decision of the learned judge below which was the subject of the appeal before us, is as follows. On 21 December 1990, the first, third, fourth and the fifth

A appellants pleaded not guilty to the charges preferred against them. On 2 April 1991, the second appellant entered a similar plea. On 10 December 1991, the magistrates' court was informed that the first and second appellants would be making an application for a transfer of the cases to the High Court, which application was not pursued. On 11 May 1992, the court was informed that an originating summons had been filed in the B High Court (vide Originating Summons No K46/1992 High Court, Kota Kinabalu) by the first appellant seeking, inter alia, a declaration that ss 27(2), 27(5) and 27(8) of the Police Act 1967 were ultra vires the Federal Constitution. On 15 September 1992, the High Court dismissed the originating summons. There was no appeal.

C On 19 July 1993, before the trial in the magistrates' court commenced, counsel for the appellants applied to the learned magistrate that he, in the exercise of his inherent powers, decline to hear the charges against the appellants on the grounds that to allow the trial to proceed would amount to an abuse of the process of the court in the circumstances, in that for D over 18 years, on nomination day, processions had accompanied candidates to nomination centres, and no prosecutions had been instituted against those participating in the processions. In response to the application, the learned senior federal counsel submitted that first, the application should be made to the High Court and not to the magistrates' court, and secondly, the learned magistrate had no inherent powers to decline to hear the E charges. The next day, the learned magistrate ruled that he could hear the appellants' application, but that he had no inherent powers to decline to hear the charges on the grounds advanced. The learned magistrate then ordered that the trial proper proceed. However, on the following day (21 July 1993), the learned senior federal counsel filed a notice of appeal F against the first finding of the learned magistrate, while the counsel for the appellants filed a notice of appeal on his second finding.

On 26 September 1994, the abovementioned appeals came up before the learned judge Suleiman Hashim J. However, both parties withdrew their appeals.

G On 3 October 1994, the appellants applied by originating motion before the same High Court for leave for an order of prohibition to be issued and addressed to the learned magistrate below to restrain the same from further hearing the charges against the appellants, on the grounds that to allow the learned magistrate to commence hearing the charges H would, in the circumstances as set out before, amount to an abuse of the process of the court. On 17 October 1994, the motion was heard and the judgment was deferred to 14 November 1994, when the said application for leave was dismissed. On 7 December 1994, a notice of appeal was filed against the said order of dismissal.

I On 19 December 1995, the appeal came before us, the second day of our sitting in Kota Kinabalu (the first circuit of the Court of Appeal), and on the same day, we dismissed the appeal. Our grounds for the order so made now follow.

The application before the High Court was quite novel, in that it was an application to prevent the magistrates' court from hearing the charges against the appellants as preferred by the prosecution, notwithstanding the provisions of the Federal Constitution and the Criminal Procedure Code (FMS Cap 6) ('the Code') with respect to the powers of the Attorney General. Perhaps it may be appropriate at this stage to repeat those provisions relevant to the matter in hand.

Article 145(3) of the Federal Constitution reads:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

Section 376(1) of the Code reads:

> The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

Mr C Skinner, learned counsel for the appellants, submitted that whilst it was not the appellants' intention to question the aforesaid powers of the Attorney General, the effect of not instituting prosecutions against those participating in such processions for over 18 years was to give rise to a reasonable expectation or legitimate expectation in members of the public that to take part in such nomination day processions would not invite a prosecution, and to institute prosecution now would be an abuse of the process of the court. He relied heavily on the unreported case of the Supreme Court of Hong Kong Magistrate Appeal No 1286/90, *R v Li Wing Tat & Ors*. This was an appeal against both conviction and sentence on information laid under sub-ss (17) and (29) of s 4 of the Summary Offences Ordinance (Cap 228) and the two sub-sections read:

> Any person who without lawful authority or excuse —
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> (17) organizes, provides equipment for, or participates in any collection of money or sale of badges in a public place save under and in accordance with a permit in writing issued by the Director of Social Welfare;
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> (29) uses or introduces in or into any public place any loud speaker, megaphone or other device or instrument for magnifying sound save under and in accordance with the conditions of any such general or special permit as the Commissioner of Police in his absolute discretion may issue;
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> shall be liable to a fine of $500 or to imprisonment for 3 months.

In this case, all the five defendants (D1–D5) went through the full trial before the learned magistrate and went on appeal against their conviction and sentence. The appeal was heard by the learned Chief Justice of Hong Kong. He divided the appeal into three parts. It was on the basis of the second part that the learned Chief Justice allowed the appeal. The second part reads:

> (II) Abuse of the Court's process, by reason of —

A the police having refrained from prosecuting under either subsection (17) or sub-section (29) for a long period of time.

As to the evidence of this case, for the present purpose, it is sufficient to refer to that part of the judgment of the court which reads:

> The only conclusion to be drawn from the evidence is that for well over a B decade the police often issued warnings against the use of loudhailers and collection of money without permit but never actually prosecuted any person. Often the warnings were given as a formality or routine, which can only mean to those warned that it would not be followed by a prosecution even if the warning was not heeded. In those circumstances, a practice has been established whereby breaches and continued breaches of the law C would not encounter anything worse than a warning. The appellants, and any one who takes part in demonstrations may therefore be forgiven for arriving at the conclusion that warnings will not be followed by prosecution even if the warnings were ignored.

So, the question before the court was whether the prosecution amounted D to an abuse of the court's process. A number of cases were referred to his Lordship. For ease of reference, we intend to quote certain parts of his judgment which appear on pp 9–12 thus:

> Lord Fraser, in *CCSU v Minister for Civil Service* [1985] 1 AC 372 said (at p 401B) that a legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the *existence* E *of a regular practice* which the claimant can reasonably expect to continue. In such a situation the courts may well find the public authority guilty of abuse of process if it chose to go back on the promise or practice so as to defeat the claimant's expectation. It seems that the rationale behind this proposition is one of fairness. However, it is for the executive and not the courts to decide whether, in any particular case, the requirements of national security F outweigh those of fairness (see pp 403D, 406G, 407G, 412H–413B, 420D, 423B–424B).
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> Fuad V-P, in *Keung Siu Wah v AG* Civil Appeal No 112 of 1989, referred to the law on the abuse of process in the criminal field as still a developing and unsettled area of the law. He said:
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> G > 'In my judgment it is a constitutional imperative that the Courts do not attempt to interfere with the Attorney General's discretion to prosecute, but once the charge or indictment comes before a Court for hearing, it can consider whether the prosecution should be allowed to continue if grounds amounting to an abuse of process are raised'.
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> H The leading authority in Hong Kong on the subject in *R v Harris* (Criminal Appeal No 72 of 1990). There Silke V-P in his explanation of the law on abuse of process in the criminal filed, observed that the decision to prosecute or not to prosecute is that of the Attorney General alone (at p 10), but went on to say (at p 14): 'I accept that a court is entitled to safeguard its process from abuse. But it is a grave and serious matter for a court to refuse I jurisdiction ... I would accept that it is unnecessary for the appellant in order to succeed to prove prejudice.'
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> Fuad V-P was concerned with the balance of public interests, and said (at p 22):

> 'I agree with the judgment just delivered by Silke, V-P but with one respectful reservation. I prefer not to express an opinion on the question whether or not the Attorney General should have resiled from his original decision not to prosecute Mr Harris. This was, in my view, entirely a matter for the Attorney General. He was, in these unusual circumstances, entitled (and, in my view, bound) to consider whether the public interest would better be served by sticking to his earlier decision or by directing the prosecution to continue. He might have felt (and I assume that this is what happened here) that the public interest demanded the latter course and that this consideration outweighed any possible erosion of confidence in the Attorney General's decisions. It seems to me that the public would have good reason to feel more concerned that the prosecution of a serious charge was not allowed to go forward simply because the Attorney General obstinately adhered to a decision he was later convinced was erroneous.'

The important judgment of Richardson J in the New Zealand Court of Appeal in *Moevao v Department of Labour* (1980) 1 NZLR 464 was cited with approval, and I note, in passing, the words of Richardson J quoted (at p 25) in Fuad V-P's judgment: 'Different persons may well have very different views as to what constitutes an abuse of process in the particular case.'

Kempster JA stressed that the categories of abuse are never closed, and observed (at p 31):

> Overall the weight of authority in England and in the Commonwealth generally demonstrates that the courts may exercise a discretionary power to stay if the conduct of the prosecution amounts to abuse in that it results in an unfair trial, oppression or prejudice to a defendant in the conduct to his case or if it involves the breach by the Crown of an agreement not to prosecute. The inroads which any exercise of the latter power may make on the Attorney General's responsibility must be acknowledged.

He continued (at pp 32–33):

> In determining whether or not the law should so be extended I am, I confess, loath further to restrict the constitutionally exclusive responsibility of the Attorney General in this field since any involvement by the courts in the prosecution process is liable to compromise and to be perceived to compromise their impartiality. A passage from the speech of Lord Dilhorne in *R v Humphryes* [1977] AC 1 (at p 26) seems in point:
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> > A judge must keep out of the arena, he should not have or appear to have any responsibility for the institution of a prosecution, the functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought then it may soon be through that the cases he has allowed to proceed are cases brought with his consent or approval. (Emphasis added.)

Finally, his Lordship came to the following conclusions:

(1) Whilst it is within the Attorney General's exclusive authority to prosecute or not, and his decision may not be made the subject of judicial review, the court is entitled to safeguard its own process from abuse.

(2) It is a grave matter for a court to refuse to hear a prosecution.

(3) In determining whether there is an abuse of process, prejudice to the accused need not be proved.

(4) As in the case of *Harris*, the Attorney General is entitled to balance the public interests of prosecuting or not prosecuting.

(5) The categories of abuse are never closed.

(6) The courts are nevertheless loath to extend the categories of abuse.

(7) In determining what amounts to a legitimate or reasonable expectation, the objective test is applied.

(8) The burden of proof is upon the person who asserts there is an abuse of process. Abuse of process is proved on a balance of probabilities.

(9) It is within the court's discretion to stay or not to stay a prosecution for reasons of abuse of process.

On the Crown's submission, the learned Chief Justice said that the Crown did not base their arguments on the balance of public interests. Instead, it was contended that there had been no stated policy by the police not to prosecute, that the executive could not suspend the law, that the defendants could not have a legitimate expectation that they would not be prosecuted, that no prejudice to the defendants had been demonstrated, that the police had on more than one occasion threatened prosecution, that the law had not fallen into desuetude, and there was nothing more than 'a pattern of discretion' not to prosecute.

In the circumstances, the learned Chief Justice found a case of abuse of the court's process had been made out. Accordingly, he ruled that the trial magistrate should have exercised her discretion to stay the proceedings.

A couple of local cases were cited before us namely the case of *JP Berthelsen v Director-General of Immigration Malaysia & Ors* [1987] 1 MLJ 134, and *Karpal Singh & Anor v PP* [1991] 2 MLJ 544.

In *Berthelsen*, it was simply a case of a failure to afford an opportunity to be heard before the cancellation of the appellant's employment pass by the immigration, and therefore, a breach of the rules of natural justice. The appellant, a citizen of the United States of America, was granted an employment pass on 2 November 1984 for a period of two years — valid until 2 November 1986 — for the purposes of his employment as a staff correspondent attached to the Kuala Lumpur office of the Asian Wall Street Journal. On 26 September 1986, he was served with a notice of cancellation forthwith of his employment pass under reg 19 of the Immigration Regulations 1963, and simultaneously issued with a special pass under reg 14(3) of the regulations to remain in the country up to 3pm on 28 September 1986 for the purpose of making arrangements to leave the country within 48 hours of service. (This deadline was subsequently extended to midnight of 1 October 1986). The appellant then applied to the High Court for leave to apply for an order of certiorari to quash the cancellation of his employment pass and for an order of prohibition against his removal from the country. The High Court refused leave solely on the ground of national security. On appeal, the Supreme Court ruled that leave should have been granted as he was not given an opportunity to be heard before the cancellation of his employment pass.

The appeal before us was a case of an application for leave to apply for an order of prohibition to be issued against the trial magistrate, to prevent him from proceeding with the trial on the ground of the abuse of the court's process. Therefore, the question before us was whether the order of prohibition could issue against a judicial officer while performing his judicial function that was within his jurisdiction.

In *Karpal Singh*'s case, the applicants applied to refer the following question of law for the consideration of the then Supreme Court:

> Whether the court has a general inherent power to protect its process from abuse to safeguard an accused person from oppression or prejudice by striking out frivolous proceedings.

In *Karpal Singh*, the applicants had been charged in April 1987 with separate offences under the Police Act 1967, the first applicant for having participated in an assembly in a public place without a licence from the officer-in-charge of the police district, and the second applicant for convening the assembly without a licence. The hearing was postponed a couple of times, and on 19 November 1987, the court was told that both the applicants had been detained under the Internal Security Act 1960. Finally, the cases were fixed for hearing on 18 July 1989. At the hearing, the applicants raised a preliminary objection contending that the proceedings against them amounted to oppression and prejudice, and that the court had a general and inherent power to protect its process from abuse and to strike out the proceedings. The application was rejected by the magistrate and subsequently by the High Court on an application for revision. The applicants then referred a question of law to the Supreme Court in the terms as mentioned above. The Supreme Court said that the sole issue was whether a magistrates' court in a criminal proceeding has power, inherent or otherwise, to strike out proceedings against an accused person on the grounds of oppression and/or harassment. The Supreme Court answered in the negative. The court dealt with the operation of art 145(3) of the Federal Constitution together with s 376 of the Code on which there have been previous pronouncements, and perhaps we need only recall the words of Abdul Hamid Omar LP (as he then was) thus (at p 548), 'The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the court's.'

Abdul Hamid Omar LP in *Karpal Singh* also dealt at some length with the operation of s 173 of the Code. This section is prefixed by the sentence: 'The following procedure *shall be observed* ....' (Emphasis added.) Then, it lays down the procedure as to what a magistrate has to do, step by step, from the moment a person is brought before him on a charge until the final disposal of the case. Clearly, a magistrate has no discretion to ramble beyond the ambit of this section. Every step as laid down '*shall be* observed' by him. After the charge is read to the accused and if he refuses to plead or does not plead or claims trial, a magistrate has no power to refuse hearing the evidence as may be offered by the prosecution to support the charge. He has no discretion to stay the proceedings but to proceed on that day or on a postponed date. He can only acquit the accused after hearing all the evidence as may be adduced by the prosecution

A if he finds no case against the accused has been made out within the direction of para (f) of s 173 of the Code. Paragraph (f) reads:

> (f) If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

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To let the accused off the hook at any stage prior to the conclusion of the prosecution case as provided under para (g) of s 173 will only result in a discharge as explained by Abdul Hamid Omar LP in *Karpal Singh* (at p 548) thus:

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> The following para (g) is the crucial one for discussion in this case. The court may discharge the accused (not acquit) if the court considers the charge to be groundless. The magistrate will have to record the reasons for his decision. If he discharges the accused, there is nothing to prevent the prosecution re-charging the accused. The reason for the discharge may be that the magistrate finds he has no jurisdiction or the charge does not
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> disclose any offence known to the Penal Code or other written law. The only circumstances under which an accused can be acquitted are those stated in para (f) and when the prosecution offers no further evidence because it feels that the prosecution case has collapsed prematurely. There is no provision in the Code for striking out proceedings or acquittal without hearing all evidence the prosecution has the capacity to offer, even though
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> postponements are needed.

To answer the question under reference, the then Lord President said (at p 549):

> In this reference we are not concerned with other paras of s 173. Our considered opinion is that the English doctrine of inherent jurisdiction is
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> hardly applicable in the subordinate courts but the High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused.

He went on to say (at the same page):

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> ... The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the court cannot act outside those powers and conditions.

H However, the learned counsel for the appellants in the present appeal referred us to an observation of the court in *Karpal Singh,* upon which we might be persuaded to rely in coming to a decision and it reads (at the same page):

> In the case of obvious abuses or other forms of material defects, it cannot be
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> said that the High Court does not possess the powers to do the right and undo wrong in the course of administration.

From the above observation, we think that the court was ventilating on the inherent powers of the High Court, and not those of a subordinate court.

Even assuming that the court had in mind to bring in the parallel of *Li Wing Tat*'s case in that the High Court in Malaysia had the inherent power to direct a subordinate court to stay the proceedings of a criminal case thereby to undo a wrong done against a citizen on the ground of abuse of the court's process, it would be injudicious on the part of the High Court to do so for it would amount to unseating the legislature against its clear injunctions as laid down in s 173 of the Code. Unlike a subordinate court within the typical English jurisdiction such as in *Li Wing Tat*'s case, a magistrates' court in Malaysia clearly does not have such an inherent power, for it has to operate strictly within the four corners of the Code.

Our present appeal concerns an application for leave from the High Court for an order of prohibition to be issued to the trial magistrate. With regard to the application for leave, the learned senior federal counsel cited the case of *Sugumar Balakrishnan v The Chief Minister of The State of Sabah* [1988] 3 MLJ 170 and argued that leave would only be granted if the applicant had some semblance of a chance of succeeding in the substantive motion. Otherwise, it would only be right and proper for the leave to be refused.

With regard to the purpose of the order of prohibition, the learned senior federal counsel referred to a comment on O 53 r 1 (at p 852, *The English Supreme Court Practice 1993*, Vol Part 1) and it reads:

> Prohibition is an order restraining an inferior court or tribunal or a public authority from acting outside its jurisdiction.

From the above discussion, it was quite clear to us that the learned magistrate below had no inherent power to stay the proceedings and to acquit the appellants on the charges preferred without hearing the evidence in support. The legislature has made it abundantly clear, as appearing in the Code, that the magistrate must hear the evidence as may be adduced by the prosecution after an accused person has claimed trial to the charge properly preferred against him. The learned senior federal counsel also referred to s 54 of the Specific Relief Act 1950 which states:

> 54 An injunction cannot be granted —
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> (e) to stay proceedings in any criminal matter.

The prohibition applied for, he submitted, was in the nature of an injunction and therefore it could not issue. In the present appeal, the charges brought against the five appellants were perfectly within the jurisdiction of the learned magistrate to deal with, and rightly, no order of prohibition can be issued against the learned magistrate.

In the circumstances, we were of the view that learned judge below was right in refusing leave, hence we dismissed the appeal.

Appeal dismissed.

Reported by Loo Lai Mee